

The Military Extraterritorial Jurisdiction Act :The Continuing Problem of Criminal Jurisdiction over Civilians Accompanying the Armed Forces Abroad—Problem Solved?

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Introduction

The problem of American civilians who commit crimes while accompanying the Armed Forces abroad has long plagued the United States government. America's federal criminal jurisdiction generally ends at the nation's borders, and so it is left to host nation countries to use their own laws to prosecute Americans who commit crimes while accompanying our armed forces. In many cases, however, these countries decline prosecution of crimes committed by American civilians, even very serious ones. This is especially true if the crime is committed only against another American or American property.² It seems that, in most instances, the host nation decides not to expend resources to prosecute crimes that do not affect any of its citizens. While the U.S. government often asserts some administrative sanction against the person committing the crime—such as barring them from American military installations—more often than not, the perpetrators receive no real punishment.

United States v. Gatlin

This problem was recently highlighted in *United States v. Gatlin*,³ a case decided by the United States Court of Appeals for the Second Circuit. In *Gatlin*, the civilian defendant was

charged with sexually abusing his teenaged step-child, the daughter of his soldier wife, while living in military housing in Germany.⁴ However, the allegations did not come to light until the defendant, his wife, and step-daughter returned to the United States where the stepdaughter revealed that she was pregnant with his child.⁵ The defendant was charged with sexual abuse of a minor⁶ and plead guilty, but before the plea was accepted, he moved to dismiss the indictment for lack of jurisdiction.⁷

The district court ruled that it had jurisdiction to try the defendant, finding that the American military housing area in Germany where the acts occurred was within the "special maritime and territorial jurisdiction of the United States," as defined in § 7 of Title 18.⁸ The Court of Appeals reversed, holding that it was clear from the legislative history that Congress intended § 7(3) to apply exclusively to the territorial United States, and therefore the overseas military housing area was not within the special maritime and territorial jurisdiction.⁹ Accordingly, § 2243(a) did not apply to the defendant's acts and the district court lacked jurisdiction to try him.¹⁰

In his opinion, Judge José Cabranes of the Second Circuit traced the history of criminal prosecutions of civilians accompanying the military overseas. He noted that various commen-

1. The author is the Chief Counsel of the Subcommittee on Crime of the Committee on the Judiciary of the U.S. House of Representatives. In that capacity he was one of the drafters of and played a key role during the drafting of the House version of The Military Extraterritorial Jurisdiction Act of 2000, H.R. 3380, 106th Cong. (2000) (enacted into law as 18 U.S.C. §§ 3261-3267 (2000)), and the amendment process of the bill as it passed through the House. He also was the staff person principally responsible for drafting of the House Committee on the Judiciary's report on House Bill 3380, H.R. REP. NO. 106-778, pt. 1 (2000). As such, the author wishes to note that any similarity between the language of the House Report and this article is unintended, although perhaps unavoidable.

2. Richard Roesler, *Civilians in Military World Often Elude Prosecution*, STARS & STRIPES, Apr. 10, 2000, at 3. In his report, Roesler notes recent incidents of rape, arson, drug trafficking, assaults, and burglaries that went unpunished when the host nation declined to prosecute.

3. 216 F.3d 207 (2d Cir. 2000).

4. *Id.* at 209-10.

5. *Id.*

6. 18 U.S.C. § 2243(a) (Supp. IV 1999).

7. 216 F.3d at 210.

8. Section 7(3) of Title 18 defines the "special maritime and territorial jurisdiction of the United States" to include:

any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the state in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

18 U.S.C. § 7(3) (2000).

9. 216 F.3d at 220.

tators “have urged Congress for over four decades to close the jurisdictional gap by extending the jurisdiction of Article III courts to cover offenses committed on military installations abroad and elsewhere by civilians accompanying the armed forces.”¹¹ He emphasized that the inaction by Congress could hardly be blamed on a lack of awareness of the jurisdictional issue; therefore the court’s decision to overturn the defendant’s conviction was “only the latest consequence of Congress’s failure to close the jurisdictional gap.”¹² Because of the significance of this problem, Judge Cabranes took “the unusual step of directing the Clerk of the Court to forward a copy of [the] opinion to the Chairmen of the Senate and House Armed Services and Judiciary Committees.”¹³

The Congressional Response

Coincidentally, at the same time *Gatlin* was making its way through the courts, Congress was working to close the jurisdictional gap that had set *Gatlin* free. On 22 November 2000, the President signed into law Senate Bill 768, the Military Extraterritorial Jurisdiction Act of 2000 (MEJA or Act).¹⁴ The Act creates a new federal crime which makes punishable conduct outside the United States that would constitute a felony under federal law if engaged in within the special maritime and territorial jurisdiction of the United States.¹⁵ The new criminal pro-

vision applies only to two groups of people: persons employed by or accompanying the armed forces outside of the United States, and persons who are members of the armed forces.¹⁶ The punishment for committing the new crime is that which would have been imposed under federal law had the crime been committed in the United States.¹⁷

The MEJA was first introduced by Senator Jeff Sessions (Republican-Alabama) on 13 April 1999 as Senate Bill 768.¹⁸ Although the Senate did not hold hearings on the bill, it considered it on the floor of the Senate on 1 July 1999, where it was slightly amended¹⁹ and passed by unanimous consent.²⁰

After the bill passed the Senate, the Departments of Justice and Defense raised concerns about aspects of the bill.²¹ In response to these concerns, Representative Saxby Chambliss (Republican-Georgia) rewrote the legislation, together with Representative Bill McCollum (Republican-Florida), the Chairman of the House Subcommittee on Crime, and introduced it in the House on 16 November 1999 as a separate bill.²² The House Committee on the Judiciary, through its Subcommittee on Crime, held a hearing on that bill, House Bill 3380, on 30 March 2000, at which representatives of the Departments of Defense and Justice testified in support of the House bill.²³ House Bill 3380 was then substantially amended during debates in the Subcommittee on Crime and the full Judiciary

10. *Id.*

11. *Id.* at 221-22 (citing several articles, including: Thomas G. Becker, *Justice on the Far Side of the World: The Continuing Problem of Misconduct by Civilians Accompanying the Armed Forces in Foreign Countries*, 18 HASTINGS INT’L & COMP. L. REV. 277 (1995); Peter D. Ehrenhaft, *Policing Civilians Accompanying the United States Armed Forces Overseas: Can United States Commissioners Fill the Jurisdictional Gap?*, 36 GEO. WASH. L. REV. 273 (1967); Robinson O. Everett & Laurent R. Hourcle, *Crime Without Punishment – Ex-Servicemen, Civilian Employees and Dependents*, 13 A.F. L. REV. 184 (1971); Susan S. Gibson, *Lack of Extraterritorial Jurisdiction over Civilians: A New Look at an Old Problem*, 148 MIL. L. REV. 114 (1995); Gregory A. McClelland, *The Problem of Jurisdiction over Civilians Accompanying the Forces Overseas – Still with Us*, 117 MIL. L. REV. 153 (1987)).

12. *Id.* at 222-23. Judge Cabranes also noted that numerous bills to close the gap had been introduced in Congress over the last forty years, but none of them had become law. For a representative sample of the bills that have been introduced for this purpose, see S. 2083, 104th Cong. (1996); H.R. 5808, 102d Cong. (1992); S. 147, 101st Cong. (1989); H.R. 255, 99th Cong. (1985); H.R. 763, 95th Cong. (1977); S. 1, 94th Cong. (1975); S. 2007, 90th Cong. (1967).

13. 216 F.3d at 223.

14. 18 U.S.C. §§ 3261-3267 (2000).

15. *Id.* § 3261(a).

16. *Id.*

17. *Id.*

18. S. 768, 106th Cong. (1999).

19. 146 CONG. REC. S8197 (daily ed. July 1, 1999) (statement of Senator Leahy).

20. *Id.*

21. Letter from Judith A. Miller, General Counsel, Department of Defense, to Sen. John W. Warner, Chairman, Committee on Armed Services, United States Senate (Sept. 3, 1999); Letter from Robert Rabin, Assistant Attorney General for Legislative Affairs, Department of Justice, to Rep. Henry J. Hyde, Chairman, Committee on the Judiciary, U.S. House of Representatives (Oct. 13, 1999) (both letters on file with the Subcommittee on Crime). The letters expressed the respective views of those departments on Senate Bill 768 in the form it was first passed by the Senate. In those letters, both departments opposed enactment of the provision that would have extended court-martial jurisdiction over civilians.

22. H.R. 3380, 106th Cong. (1999).

Committee²⁴ and passed by the House by voice vote on 25 July 2000.²⁵ By agreement among Senator Sessions, Representative Chambliss, and Representative McCollum (who oversaw the amendment process of the legislation), instead of sending House Bill 3380 to the Senate, the House substituted the text of the bill as passed by the House (that is, as it had been revised by the House Judiciary Committee) for the text of Senate Bill 768. The House passed the revised Senate bill and sent it back to the Senate.²⁶

On 25 October 2000, the Senate voted on the amended version of Senate Bill 768 and once again passed the bill by unanimous consent.²⁷ The President signed the bill into law on 22 November 2000.²⁸

The Military Extraterritorial Jurisdiction Act of 2000

The MEJA enacted new chapter 212 to Title 18 of the United States Code, entitled “Military Extraterritorial Jurisdiction.” The new chapter consists of seven sections, each of which is discussed below.

Section 3261. Criminal Offenses Committed by Certain Members of the Armed Forces and by Persons Employed by or Accompanying the Armed Forces Outside the United States

Section 3261 is the heart of the new chapter, and states the new offense created by the Act. It creates a new federal crime

involving conduct engaged in outside the United States by members of the armed forces or by persons employed by or accompanying the armed forces abroad that would be a felony if committed within the United States.²⁹ While the language of the Act uses the jurisdictional phrase “if committed within the special maritime and territorial jurisdiction of the United States,” the House Report on House Bill 3380 states that conduct that would be a federal crime regardless of where it takes place in the United States, such as the drug crimes in Title 21, also falls within the scope of § 3261.³⁰

As discussed above, prosecutions for violations of the MEJA may be brought only against persons who fall within two broad categories, both defined in the statute: (1) persons who are employed by or accompanying the armed forces outside the United States; or (2) persons who are members of the armed forces and subject to the Uniform Code of Military Justice (UCMJ) at the time the conduct occurs.³¹ The maximum punishment for the crime is determined by cross referencing the maximum punishment provided for in the federal statute that makes the same conduct an offense if committed in the United States.³²

In some cases, conduct may violate both § 3261 and another federal statute having extraterritorial application. In such cases, according to the House Report, the government may proceed under either statute.³³ The House Report also noted that:
it may be helpful in charging violations of § 3261 for prosecutors to make some reference

23. *Military Extraterritorial Jurisdiction Act of 1999: Hearings on H.R. 3380 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 106th Cong. 9 (2000) [hereinafter *Hearings*].

24. See H.R. REP. NO. 106-778, pt. 1 (2000); see also 146 CONG. REC. H6930-32 (daily ed. July 25, 2000) (prepared statement of Rep. Bill McCollum introduced into the record during the House debate on H.R. 3380).

25. 146 CONG. REC. H6932 (daily ed. July 25, 2000). The Clinton Administration reiterated its support for the amended bill. See Office of Management and Budget, Statement of Administration Policy on H.R. 3380 (July 25, 2000), at <http://www.whitehouse.gov> (OMB, legislative, sap, 06-2).

26. 146 CONG. REC. H6940 (daily ed. July 25, 2000); see also 146 CONG. REC. H6931-32 (prepared statement of Rep. McCollum).

27. 146 CONG. REC. S11184 (daily ed. Oct. 26, 2000). The author of the original Senate bill and the ranking minority member of the Senate Committee on the Judiciary also noted their agreement with the analysis of the bill contained in the House Report and stated that the report reflected the intentions of the Senate. *Id.* at S11183 (statements of Sen. Sessions and Sen. Leahy).

28. The Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, 114 Stat. 2488.

29. 18 U.S.C. § 3261(a) (2000).

30. H.R. REP. NO. 106-778, at 14-15 & n.27 (2000).

31. 18 U.S.C. § 3261(a).

32. *Id.* The House Report on House Bill 3380 provides an example of how the maximum punishment under § 3261 would be determined:

If a person described in subsection (a) were to engage in conduct outside the United States that would violate section 2242 of title 18 (relating to sexual abuse) were it to have occurred on Federal property within the United States, that conduct will violate new section 3261 and may be punished by a United States court in the same manner provided for in section 2242. The offense to be charged, however, is a violation of section 3261, not section 2242. Section 2242 only determines the maximum punishment that may be imposed for the violation of section 3261. A violation of section 2242 would not be charged.

H.R. REP. NO. 106-778, at 15.

to the statute that would have been violated had the act occurred within the United States, so as to put the defendant on notice of the elements of the crime that the government will attempt to prove and the maximum punishment that may be imposed for the violation of section 3261.³⁴

Section 3261(b) limits prosecutions under the MEJA if a foreign government, in accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting the suspect for the conduct that constitutes the offense, unless the Attorney General or Deputy Attorney General, or a person acting in either of those capacities, approves otherwise.³⁵ In short, this provision allows the United States a “second bite at the apple” in order to prosecute the defendant a second time, presumably when it believes that the punishment meted out by the host nation is insufficient.

Subsection 3261(c) recognizes and maintains the possible concurrent jurisdiction of courts-martial, or other military courts, commissions, or tribunals in appropriate cases.³⁶ This is an important provision, but should be distinguished from subsection (d), which prohibits prosecutions under § 3261 of members of the armed forces.³⁷ Whereas § 3261(c) provides for concurrent jurisdiction over civilians in limited circumstances, § 3261(d) confers exclusive jurisdiction to the military over

members of the armed forces, unless the person is no longer subject to the UCMJ or is alleged to be the codefendant of one or more civilians.³⁸ Because properly discharged service members may not be recalled to duty, the government was, prior to enactment of the MEJA, powerless to prosecute them under the UCMJ or federal law, for acts they committed outside the United States, a problem that has plagued the military for some time.³⁹ Section 3261(d) cures this jurisdictional defect, enabling the government to prosecute soldiers who commit crimes but are discharged before their conduct is discovered. It may also allow the government to prosecute a person who commits a crime while in federal service as a member of a reserve component but then returns to civilian life and is no longer subject to the UCMJ.⁴⁰

As noted above, the limitation on prosecution of military members of subsection (d) also does not apply if the military member is charged for the offense together with at least one other person who is not subject to the UCMJ.⁴¹ According to the House Report, the provision “is designed to allow the Government to try the military member together with a non-military co-defendant in a United States Court.”⁴² In such a case, concurrent jurisdiction would exist to try the person under either the UCMJ or the MEJA.

33. *Id.* at 15 n.28 (citing *United States v. Batchelder*, 442 U.S. 114 (1979)).

34. *Id.* at 15 n.29.

35. 18 U.S.C. § 3261(b). The House Report notes that in most instances, this recognition will occur through a status of forces agreement entered into by the United States and the host nation. H.R. REP. NO. 106-778, at 16.

36. 18 U.S.C. § 3261(c). The concurrent jurisdiction referred to in § 3261(c) is “with respect to offenders or offenses that by statute or by the law of war may be tried by a court-martial, military commission, provost court, or other military tribunal.” *See, e.g.*, UCMJ arts. 2(a) (7) -(12), 18 (2000).

37. 18 U.S.C. § 3261(d).

38. *Id.*; *see* UCMJ art. 2(c). Under current law, persons entitled to receive retired pay (generally paid only to those who served for twenty years or more on active duty) may be recalled to active duty for the purpose of being tried for an offense under the UCMJ after they are discharged. Retired members of a reserve component who are receiving hospitalization from an armed force also may be recalled to active duty and tried by court-martial. UCMJ art.2(a)(4) and (5). But generally, once properly discharged, service members are no longer subject to courts-martial jurisdiction. MANUAL FOR COURTS MARTIAL, UNITED STATES, R.C.M. 202(a) discussion (2000) [hereinafter MCM].

39. *See, e.g.*, *Toth v. Quarles*, 350 U.S. 11 (1955); *Smith v. Vandebush*, 47 M.J. 59 (1997). *See also* Everett & Hourcle, *supra* note 11; Note, *Jurisdictional Problems Related to the Prosecution of Former Servicemen for Violations of the Law of War*, 56 VA. L. REV. 947 (1970)

40. Members of the military who serve in one of the reserve components are subject to the UCMJ only when serving in a federal duty status. *See* UCMJ arts. 2(a)(1), 2(a)(3), 2(d). In order to use the UCMJ to prosecute members of the Reserves or National Guard who commit illegal acts abroad while in federal service, the member must be called to active duty. *Id.* art. 2(d)(1). The language of § 3261(d) permits federal prosecution of military members when they “cease[] to be subject to” the UCMJ. According to the House Report, this section of the Act now “gives the government concurrent jurisdiction with the military over members of the reserve components who commit crimes overseas.” H.R. REP. NO. 106-778, at 11 n.23 .Of course, because reservists remain subject to recall for crimes committed while in federal service, some may view the language of the statute as barring a prosecution under § 3261, yet this interpretation does not appear to be the position of the drafters of the Act, as reflected in the report.

41. 18 U.S.C. § 3261(d)(2).

42. H.R. REP. NO. 106-778, at 16.

Section 3262. Arrest and Commitment

This section of the MEJA authorizes Department of Defense (DOD) personnel serving in law enforcement positions to arrest and detain persons who are suspected of violating § 3261.⁴³ While military police and criminal investigators do arrest and detain civilians who commit crimes and infractions (such as traffic violations) on military property, this authority is limited and the arrested individuals are promptly turned over to local civilian authorities.⁴⁴ Section 3262 broadens military authorities' power to arrest and hold civilians who commit crimes while accompanying the armed forces abroad. To exercise this power, the DOD law enforcement personnel must be designated and given authority by the Secretary of Defense.⁴⁵ The section also requires a normal probable cause determination for making arrests, that is, probable cause exists to believe that a person has violated § 3261(a).⁴⁶ Once arrested, military officials must deliver the person arrested to the custody of civilian law enforcement authorities of the United States as soon as practicable, unless doing so would require removal to the United States without prior order from a federal magistrate or the Secretary of Defense in accordance with § 3264, or if the person is to be tried under the UCMJ.⁴⁷

Section 3263. Delivery to Authorities of Foreign Countries

In the event that a host nation chooses to use its own laws to prosecute a person for acts that also violate § 3261, American military officials must deliver the accused to the custody of "appropriate authorities of [the] foreign country" pursuant to section 3263.⁴⁸ Delivery to foreign authorities is not automatic, however. Appropriate foreign officials, as determined by the Secretary of Defense, in consultation with the Secretary of State, must first request that the accused be delivered to them.⁴⁹

Additionally, the accused may only be handed over if delivery is authorized by a treaty or other international agreement to which the United States is a party.⁵⁰ In most cases, this will be a status of forces agreement.

Sections 3264 and 3265. Overview

The MEJA contains an unusual and complex pair of sections, one that limits the power of the government to return a defendant to the United States until certain conditions have been met, and another that requires some of the initial proceedings in a case under the Act to be held before the defendant is returned to the United States. These provisions were added during House deliberations on House Bill 3380, principally to address the concerns of the American Civil Liberties Union (ACLU) and the Federal Education Association (FEA), the union that represents teachers in DOD schools.⁵¹ At the hearing on House Bill 3380, the FEA representative expressed concern that the bill, as it was introduced, would have allowed the Government to forcibly return a person to the United States based solely on an allegation, before any real investigation into the merits, with the potential that an innocent defendant might have to bear the expensive costs of returning to a far away duty station if charges were later dismissed.⁵²

In response to these concerns, Representative McCollum offered an amendment to the bill that added two new sections. The first limits the power of military and civil law enforcement authorities to forcibly return a defendant to the United States. The second provides for some of the initial proceedings in the criminal case to occur prior to the defendant being returned to the United States and affords the defendant some control over whether and when he is returned.

43. 18 U.S.C. § 3262.

44. See Matthew J. Gilligan, *Opening the Gates?: An Analysis of the Military Law Enforcement Authority Over Civilian Lawbreakers On and Off the Federal Installation*, 161 MIL. L. REV. 1, 18 (1999). See also U.S. DEP'T OF ARMY, REG. 190-30, MILITARY POLICE INVESTIGATIONS, para. 4-8 (1 June 1978); U.S. DEP'T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATIVE ACTIVITIES, para. 3.21 (30 Oct. 1985).

45. *Id.* § 3262(a).

46. *Id.*

47. *Id.* § 3262(b). See *infra* notes 49 through 63 and accompanying text.

48. *Id.* § 3263.

49. *Id.* § 3263(a)(1) and (b).

50. *Id.* § 3263(a)(2).

51. *Hearings, supra* note 23, at 27-31 (statement of Jan Mohr, President, Federal Education Association).

52. *Id.* In light of the responsive changes to the bill, both the ACLU and the FEA supported the passage of House Bill 3380. Letter from Mary Elizabeth Teasley, Director of Government Relations, National Education Association, and Rachel King, Legislative Counsel, American Civil Liberties Union, to Rep. Bill McCollum, Chairman, Subcommittee on Crime, U.S. House of Representatives, and Rep. Bobby Scott, Ranking Minority Member, Subcommittee on Crime, U.S. House of Representatives (July 12, 2000) (on file with the Subcommittee on Crime).

Section 3264. Limitation on Removal

Section 3264 addresses the due process concerns of the ACLU and the FEA by limiting the power of military and civil law enforcement officials to remove a person arrested for or charged with a violation of § 3261 from the country in which they are arrested or found.⁵³ According to the House Report, the phrase “arrested for or charged with” was used “to make it clear that the limitation applies to situations where the person has been arrested and also where the person has not been arrested but has been charged by indictment or the filing of an information.”⁵⁴

Section 3264(a) sets forth the general limitation that a person arrested or charged with a violation of § 3261 may not be forcibly returned to the United States or taken to any foreign country other than a country in which the person is believed to have committed the crime or crimes for which they have been arrested or charged.⁵⁵ This provision means that once American authorities arrest a person for a violation of § 3261, whether based on a citizen’s complaint or after an information or indictment is returned against the person, the defendant must be held in the country in which he was arrested or in the country in which the crime is believed to have been committed. If a person commits a crime in one country and then flees that country, military authorities have the option of returning him to the country in which the crime was committed.⁵⁶

Section 3264(b) establishes five exceptions to the general limitation on forced removals. The first two exceptions relate to pretrial detention proceedings in federal courts.⁵⁷ Sections 3264(b)(1) and (2) allow a federal magistrate judge to order

removal of a defendant to the United States to appear at a detention hearing⁵⁸ or to be detained pending trial.⁵⁹ For the latter to occur, the defendant must waive physical presence at the detention hearing, as the magistrate judges are in the United States.⁶⁰

The third exception to § 3264(a) allows removal to the United States to allow the defendant’s presence, unless waived, at a preliminary examination held pursuant to the Federal Rules of Criminal Procedure (FRCP).⁶¹ While a defendant is not entitled to such a hearing if an indictment is returned or information filed against him, the Act requires that if such a hearing is to take place it must occur within the time limits set forth in the rules, and the defendant must be removed to the United States in time to attend the hearing.⁶²

Finally, § 3264(b) contains two additional catch-all exceptions to the Act’s limitation on forced removal of a defendant to the United States. First, a federal magistrate judge has blanket authority to order a defendant’s removal at any time.⁶³ The House Report notes that while “removal of a person for a reason other than [those discussed above] would be rare, paragraph (b)(4) grants judges the discretion to order such removal.”⁶⁴ Second, DOD officials may remove the defendant from the place where he or she is arrested if the Secretary of Defense determines that removal is required by military necessity.⁶⁵ As explained in the House Report, this authority is to be used sparingly, such as “in situations where the person is arrested in an ‘immature theater’ or in such other place where it is not reasonable to expect that the initial proceedings required by section 3265 can be carried out.”⁶⁶ Thus, under this authority, a defendant may be transferred to a place other than where the crime was committed or where the person was arrested, but only to the

53. 18 U.S.C. § 3264(a); H.R. REP. NO. 106-778, at 17 (2000).

54. H.R. REP. NO. 106-778, at 17.

55. 18 U.S.C. § 3264(a).

56. *Id.*

57. See 18 U.S.C. § 3142. Sections 3142(e) and (f) are the federal equivalent to the military’s pretrial confinement rules. See MCM, *supra* note 38, R.C.M. 305.

58. 18 U.S.C. § 3264(b)(1). If a Federal magistrate orders a defendant removed pursuant to this subsection, the MEJA requires that he be returned to the United States in time for the detention hearing. H.R. REP. NO. 106-778, at 17.

59. 18 U.S.C. § 3264(b)(2). Subsection (b)(2) requires prompt removal of the defendant to the United States in order to serve the detention. A defendant ordered into pretrial detention may not be held by military authorities. H.R. REP. NO. 106-778, at 17.

60. See *infra* notes 64-79 and accompanying text.

61. See FED. R. CRIM. P. 5, 5.1.

62. 18 U.S.C. § 3264(b)(3); H.R. REP. NO. 106-778, at 17.

63. 18 U.S.C. § 3264(b)(4).

64. H.R. REP. NO. 106-778, at 18 (2000).

65. 18 U.S.C. § 3264(b)(5). The Secretary of Defense may delegate his authority to make this determination as necessary. See 10 U.S.C. § 113(b) (2000).

66. H.R. REP. NO. 106-778, at 18.

“nearest United States military installation outside the United States that is adequate to detain the person and facilitate the initial proceedings described in section 3265.”⁶⁷

Section 3265. Initial Proceedings

Section 3265 is the second provision added to the bill by the McCollum amendment, and is intended to harmonize the extra-territorial arrest authority of § 3262 with the preliminary proceedings procedures of the FRCP.⁶⁸ It governs the initial appearance under FRCP 5 of a person arrested for or charged with a violation of § 3261 and not delivered to foreign authorities for prosecution.⁶⁹ Section 3265(a)(1) requires that the initial appearance be conducted by a federal magistrate judge, and allows the magistrate judge to conduct the initial appearance of the defendant before the court by telephone “or such other means that enables voice communication among the participants”⁷⁰ Although these procedures are not required by the statute, and the judge retains the discretion to order the defendant’s return to the United States,⁷¹ as a practical matter most initial appearances under the Act will probably occur by this means. Given the perfunctory nature of the initial appearance, there would be little benefit to the judge requiring the defendant to be physically present. Congress clearly expected that this provision would be used routinely. As the House Report states, “in the vast majority of cases, the initial appearance of a person arrested or charged under section 3261 will be conducted by

telephone or other appropriate means so that the defendant may remain in the country where he or she was arrested or was found.”⁷² The report also notes that while the appearance may be conducted by telephone, the preferred means is by video teleconference or similar means whenever possible.⁷³

Section 3265(b) governs any detention hearing held under § 3142(f) of Title 18. As with the initial appearance, detention hearings must be conducted by federal magistrate judges.⁷⁴ If a detention hearing is held, the judge may also conduct this hearing by telephone or such other means that allow all parties to participate and to be heard by all other participants.⁷⁵ Unlike the initial appearance, however, the detention hearing may only be conducted in this manner if requested by the defendant.⁷⁶ The act treats this hearing differently from the initial appearance because defendants have the right to testify and present witnesses and other information and to confront witnesses against them at detention hearings; rights that have constitutional dimensions.⁷⁷ Therefore, if the defendant does not request that the hearing be conducted by electronic means, he must be returned to the United States in time for the hearing.⁷⁸ Even if the defendant requests that the hearing be conducted in this manner, the judge retains the discretion to deny the request.⁷⁹

Section 3265(c), which provides for the appointment of military counsel to represent defendants accused of violating § 3261 during the initial proceedings described in the Act, is sure

67. 18 U.S.C. § 3264(b)(5). The House Report also provides that “[w]hile new section 3264(b)(5) states that the installation must be adequate to ‘facilitate the initial appearance described in section 3265(a),’ as a practical matter, it should also be adequate to facilitate the proceedings described in 3265(b).” H.R. REP. NO. 106-778, at 19 n.36.

68. See FED. R. CRIM. P. 3-5.1.

69. 18 U.S.C. § 3265(a)(1).

70. *Id.* § 3265(a)(1)(A) and (B).

71. See *supra* notes 61-62 and accompanying text.

72. H.R. REP. NO. 106-778, at 19.

73. *Id.*

74. 18 U.S.C. § 3265(b)(1).

75. *Id.* § 3265(b)(2).

76. *Id.*

77. See, e.g., *United States v. Smith*, 79 F.3d 1208 (D.C. Cir. 1996). Of course, if the defendant chooses to remain in the foreign country, he will effectively waive his right to be physically present before the judge. H.R. REP. NO. 106-778, at 20.

78. H.R. REP. NO. 106-778, at 20.

79. *Id.* The House Report suggests several factors that the judge should consider in making this decision:

whether the Government opposes the defendant's request (to include considerations based on military exigencies or special circumstances bearing on the issue), the likelihood from information presented at the initial appearance that the defendant will be ordered detained, and whether the parties intend to present live witness testimony at the hearing and the place of residence of any witnesses.

Id. at 20. It is clear from the report that this is not intended to be an exhaustive list of the factors that the judge should consider.

to cause some concern in military circles. The terms of the MEJA provide for the appointment of “qualified military counsel” to defendants “entitled to have counsel appointed for purposes of such a proceeding.”⁸⁰ Such appointments, however, should be limited only to cases in which the defendant is financially unable to retain counsel, or if no qualified civilian counsel is available in the country where the initial proceeding will be held.⁸¹ The judge may appoint only those members of the military designated for that purpose by the Secretary of Defense.⁸² Neither the Act or the House Report state which officers must be so designated (except that they must be judge advocates) or how the fact of their designation is to be made known to the non-military magistrate judge. Clearly, this issue will have to be addressed in the implementing regulations for the Act, and perhaps also in regulations relating to military law in general. Representation by appointed military counsel is limited to only the initial proceedings described in § 3265, and then only if the defendant is not removed to the United States for those proceedings.⁸³

Section 3266. Regulations

Section 3266 of the Act requires the Secretary of Defense to prescribe regulations governing the apprehension, detention, delivery, and removal of persons under the MEJA.⁸⁴ The regulations are also to provide for the facilitation of the initial proceedings prescribed in § 3265.⁸⁵ Additionally, the regulations require that, to the fullest extent practicable, notice be given to those civilians subject to the statute who are not U.S. nationals, that they are potentially subject to the criminal jurisdiction of the United States.⁸⁶

The Act requires the Secretary of Defense to consult with the Secretary of State and the Attorney General in developing the regulations required by § 3266.⁸⁷ As an indication that Congress intends to use its oversight power to monitor the way in which the military implements the Act, it took the unusual step of requiring the Secretary of Defense to submit a report containing the proposed regulations, and such other information as the Secretary may determine appropriate, to the House and Senate Committees on the Judiciary.⁸⁸

Section 3267. Definitions

Section 3267 defines several key words and phrases used throughout the new chapter. Most important among them are the phrases “employed by the Armed Forces outside the United States” and “accompanying the Armed Forces outside the United States.” The act defines the former to mean a DOD civilian employee, including a nonappropriated fund instrumentality employee, a DOD contractor or subcontractor of any level, or an employee of such contractor or subcontractor.⁸⁹ It specifically excludes from this definition persons who are nationals of the country in which the crime is believed to have been committed or persons ordinarily resident there.⁹⁰ The phrase “accompanying the Armed Forces outside the United States” is defined as persons who are dependents of and reside with military members, DOD civilian employees or NAF employees, or DOD contractors and subcontractors or their employees outside the United States.⁹¹ As with the prior definition, this term also does not include persons who are nationals of the country in which the crime is believed to have been committed or persons ordinarily resident there.⁹² Finally, the House

80. 18 U.S.C. § 3265(c)(1). Qualified military counsel are those who have graduated from an accredited law school or are members of the bar of a federal court or the highest court of a state that are certified by their respective Judge Advocate Generals as competent to perform the required duties. *Id.* § 3265(c)(2).

81. H.R. REP. NO. 106-778, at 21-22.

82. *Id.*

83. *Id.*

84. 18 U.S.C. § 3266(a).

85. *Id.*

86. *Id.* § 3266(b). Failure to provide this notice does not defeat the jurisdiction of the United States over the person or provide a defense to any proceeding arising under the MEJA. *Id.* § 3266(b)(2).

87. *Id.* § 3266(a) and (b).

88. *Id.* § 3266(c). In fact, the Act prohibits the regulations from taking effect until ninety days have passed from the date the report is submitted to those committees, and any amendments to the regulations also must first be submitted to the committees before they may take effect.

89. 18 U.S.C. § 3267(1)(A) and (B).

90. *Id.* § 3267(1)(C).

91. *Id.* § 3267(2)(A) and (B).

92. *Id.* § 3267(2)(C).

Report also makes it clear that juveniles are included within this term.⁹³

Issues Not Addressed in the Act

As thorough as the MEJA is, there are several issues that it does not address, but which must be examined in order to properly implement the statute. While most of these gray areas likely will be addressed through regulations or memorandums of agreement between the Departments of Defense and Justice, some may require further congressional action.

The Military's Role After a Defendant is Arrested

One gray area involves what role the military will play once a person is arrested for a suspected violation of the MEJA. Will military authorities contact a U.S. Attorney directly and present the evidence they have collected so far, or will officials at the Justice Department in Washington take on that responsibility? Will military officials continue to investigate the case and collect evidence against the defendant after the initial arrest? While the Act does authorize military officials to arrest and detain a civilian who may have violated § 3261, it is silent as to whether military officials are to investigate the case any further. The Act clearly indicates a preference that civilian authorities take charge of the defendant at the earliest possible time, and so it seems reasonable that Congress did not intend military authorities to actively investigate cases. If so, it is also unlikely that Congress intended that the military have any role in making the decision as to when and where a case would be presented to a U.S. Attorney for prosecution. The likely resolution of this issue is that the military will communicate the fact of an arrest under the act to the Department of Justice (DOJ) in Washington. The DOJ will then conduct any further investigation (or at least take the lead in a joint investigation with military criminal investigators), and will decide if and where to proceed against the defendant.

Assignment of a Case to a United States Attorney

Another related gray area is how to determine which U.S. Attorney's office will handle the prosecution of a case under the act. Usually, law enforcement authorities in the judicial district where the crime occurred approach the U.S. Attorney there with evidence of the crime and ask for an indictment of the person suspected of committing the crime. It is unclear under the

MEJA which U.S. Attorney is responsible for proceeding against alleged offenders. If one U.S. Attorney declines to seek an indictment, could DOJ officials approach other U.S. Attorneys until they find one who is willing to indict? As discussed below, determining where the initial proceedings will take place in advance of any prosecution could solve this problem, but until that occurs, the DOJ will have to develop some internal protocol to decide this question.

Venue for the Initial Proceedings of a Case Under the MEJA

The most significant issue left open by the Act is how Federal magistrate judges will be appointed to preside over the initial proceedings that are required for prosecutions under the Act. As discussed above, the drafters of the Act envisioned that most often, proceedings will occur before the defendant is returned to the United States, yet the Act does not specify the venue for these proceedings. The FRCP provide that venue for the "prosecution" of an offense is to be the district in which the offense is committed.⁹⁴ For offenses that are not committed in any judicial district, however, § 3238 of Title 18 determines the place of trial for the offense.⁹⁵ However, judges might not construe § 3238 to apply to the initial proceedings under the Act because the statute, by its terms, only determines the place of trial and nothing else. Unlike FRCP 18, the statute does not speak in terms of the "prosecution" of the offense.

Even if a court did look to the statute for guidance, its application could lead to conflicting decisions as to the jurisdiction in which the proceedings will be conducted. Under the MEJA, initial proceedings will often occur after the person is arrested but before the person is brought to the United States and, in many cases, also before any indictment is filed. Under § 3238, in such a case, venue would lie only in the District of Columbia. The government may, however, bring the defendant to the United States for trial at a place other than the District of Columbia (as there is no airport actually in that judicial district). In that circumstance, venue for trial would lie in the district to which the defendant was actually brought, that is, where the airplane first lands in the United States. Thus, applying the Federal venue statute to the Act might result in two different districts having jurisdiction over different portions of the case; clearly an unsatisfactory result.

In order to avoid this confusion, the government could simply use its best guess as to where the defendant might enter the United States and seek out a magistrate in that district to preside over the initial proceedings. Even so, no rule or statute specif-

93. H.R. REP. NO. 106-778, at 21-22. If the person committing the crime is a juvenile, however, the federal juvenile delinquency procedures apply. See 18 U.S.C. §§ 5031-5042 (2000).

94. FED. R. CRIM. P. 18.

95. 18 U.S.C. § 3238. This section provides that venue for trial lies in the place where the defendant is "arrested or first brought." If the person is not arrested or brought, then an indictment or information is to be filed in the district of the offender's last known residence. And if that is not known, then venue lies in the District of Columbia. *Id.*

ically authorizes a magistrate there to preside over those proceedings, and some magistrates may be reluctant to act without being able to rely on at least some authority. And, of course, if the government guessed wrong, the result might again be that a judge in one district would conduct the initial proceedings and a judge in another district would preside over the defendant's trial.

While this gray area is certainly not a fatal defect to prosecutions under the Act, the issue could be addressed by revising FRCP 18, or by promulgating a new rule that would apply to prosecutions brought under the Act. Because Congress generally allows the Judicial Conference of the United States and its various rules committees to propose changes in the several sets of rules of procedure, Congress could, instead, amend the statutory venue provision to address the unique procedures under the Act. For example, since prosecutions under this Act are not likely to be common, a single district could be established for all such prosecutions. Another approach could be that one of several districts would be identified for this purpose, and assigned based on where the alleged crime occurred (for exam-

ple, the Southern District of New York for crimes in Europe, the Southern District of Florida for crimes in Central and South America, and the District of Hawaii for crimes occurring in the Pacific rim countries).⁹⁶

Conclusion

The Military Extraterritorial Jurisdiction Act of 2000 is a significant development in America criminal law. It closes a jurisdictional gap in the law that has been a concern to DOD and DOJ officials for decades. By doing so, it will help the military instill confidence in its personnel and their families that the government is doing all it can to protect them when it sends them abroad in defense of the nation's interests. The passage of the Act will also build trust with our allies who will know that America can now more effectively police the actions of its personnel who are deployed to a foreign country. And, most importantly, the Act will help to ensure that justice is done whenever a member of our military or a person accompanying it abroad commits a crime.

96. The House Report on House Bill 3380 noted that the:

committee expects that the Department of Justice will develop a procedure for initiating proceedings under chapter 212, which will include some means for selecting the federal judicial district in which such proceedings will be commenced. The bill does not require, nor does it prohibit, that the initial proceedings of all cases brought under chapter 212 be held in the same judicial district. The committee notes that venue for the trial of a violation of section 3261 is governed by section 3238 of title 18. Nothing in the bill changes that. The committee also notes that, in some cases, initial proceedings under section 3265 may be conducted by a judge who does not sit in the judicial district in which a trial of the person arrested or charged may take place. That fact has no bearing on the determination of venue under section 3238.

H.R. REP. NO. 106-778, at 20.